Supreme Court, U.S.
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No. 93-1401

In the Supreme Court of the United States

OCTOBER TERM, 1993

GEORGES V. ABI-GHANEM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

CYNTHIA A. YOUNG
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court should have granted petitioner's motion under 28 U.S.C. 2255 to vacate his earlier guilty plea, on the ground that the parties failed to disclose to the court during the plea proceedings that the government's acceptance of plea agreements from petitioner and his co-defendant was conditioned on both defendants' agreement to plead guilty.

2. Whether the court of appeals erred in affirming the denial of petitioner's motion without rendering a written opinion.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1-2) is unreported, but the judgment is noted at 9 F.3d 114 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1993. A petition for rehearing was denied on December 6, 1993. Pet. App. 13. The petition for a writ of certiorari was filed on March 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the District of Minnesota, petitioner was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiring to defraud the government, in violation of 18 U.S.C. 371. He was sentenced to 18 months' imprisonment. Pet. App. 68-73. Petitioner did not appeal his conviction or sentence. Petitioner did write a letter to the district court requesting a reduction in his sentence, which the court treated as a motion under Fed. R. Crim. P. 35. The district court denied that motion (Pet. App. 74-75), and the court of appeals affirmed (see *id.* at 4 n.1).

Petitioner subsequently filed a motion under 28 U.S.C. 2255 to vacate his conviction and withdraw his guilty plea. Pet. App. 76-85. The district court denied that motion (*id.* at 3-12), and the court of appeals affirmed (*id.* at 1-2).

1. Petitioner was an owner and the vice president of EWA, Inc., a private engineering consulting firm that specialized in toxic waste studies. In May 1984, the Yakima Indian Nation hired EWA to do the engineering consulting work on a grant from the United States Department of Energy (DOE) to study the effects on the Yakima Reservation of a proposed nuclear waste site nearby in Hanford, Washington. The Yakima Nation renewed its contract with EWA annually from 1984 through December 1987, when DOE notified the Yakima Nation that a site in Nevada had been chosen for the nuclear waste. DOE continued its support to enable the Yakima Nation to review DOE's plans to restore the Hanford site to its original state. The Yakima Nation again hired EWA for that project, which extended the contract to 1989. Gov't C.A. Br. 3-4; see also Pet. App. 14-36 (indictment).

EWA's contract with the Yakima Nation was based upon time and materials expended, up to the contract ceiling. Each month, EWA submitted invoices for the work performed on the DOE contract to the Yakima Nation, which then transferred DOE funds to EWA. The Yakima Nation's contracts with EWA from 1984 through 1989 resulted in a total payment to EWA of approximately $4.7 million in DOE grant funds. Of that total, government auditors determined that approximately $465,000 represented fraudulent billings by EWA. The government alleged that beginning in 1984, EWA falsely billed the Yakima Nation—and thus DOE—by charging the Yakima Nation for work hours that involved other EWA contracts, including other government agency contracts and one private contract, and by misrepresenting its employees' rates of pay. The indictment charged that petitioner participated in the false billing scheme by, among other things, overstating the hours he spent working on the Yakima Nation contract, causing other employees to do the same, and charging to that contract hours spent on projects outside its scope. See Gov't C.A. Br. 3-5; Pet. App. 14-18 (indictment); Pet. App. 50-53 (recitation of terms of supplemental criminal information).

The government further charged that petitioner and his co-defendants, EWA and its president, Vietchau Van Nguyen, executed a similar scheme in connection with two EWA contracts with the Army Corps of Engineers. In 1986, EWA contracted with the Corps to conduct hydrology studies. In 1988, EWA obtained a similar contract from the Corps through the Small Business Administration's (SBA) minority and disadvantaged business concerns program. On both contracts, the government alleged that EWA falsely represented to the Corps and to SBA the qualifications and pay rates for

EWA employees, thus inflating the Corps' bills. Gov't C.A. Br. 5; Pet. App. 14-18 (indictment); Pet. App. 50-53 (terms of supplemental information).

2. The grand jury returned a 25-count indictment charging petitioner, EWA, and Nguyen with various criminal offenses in connection with the Yakima Nation and Corps of Engineers contracts. Pet. App. 14-36. On November 30, 1990, pursuant to a plea agreement, petitioner pleaded guilty to one count of mail fraud in connection with the Corps contract, as charged in the indictment, and to one count of conspiring to defraud the government with respect to both the Yakima Nation and Corps contracts, as charged in a supplemental criminal information filed with the plea agreement.[1] *Id.* at 37-67. Petitioner's plea agreement provided that the offense conduct occurred before November 1, 1987 (and thus that the Sentencing Reform Act of 1984 would not apply, see 18 U.S.C. 3551 note); that each offense carried a maximum sentence of five years in prison, a $250,000 fine, or both, and up to five years' probation; that the government would not seek restitution as part of petitioner's criminal sentence, but would remain free to pursue civil recovery proceedings; and that the other 24 counts of the indictment would be dismissed. Pet. App. 37-39.

During the hearing held under Fed. R. Crim. P. 11 in connection with the acceptance of petitioner's pleas, the district court questioned petitioner at length about his understanding of the rights he was surrendering by pleading guilty, the possible sentence he faced, the charges to which he was pleading guilty, the factual

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[1] Petitioner waived his right to indictment on those charges as part of the plea proceedings. Pet. App. 47-50; see Fed. R. Crim. P. 7(b).

basis for those charges, and the terms of the plea agreement. Pet. App. 40-67. Petitioner stated that he had discussed the plea agreement with his attorney and understood and agreed with its terms. See, *e.g.*, *id.* at 41-42, 46, 58, 65-66. In response to the court's questioning, petitioner denied that he had been subjected to any force or threats in connection with his pleas, or had been offered any promises other than those contained in the plea agreement. *Id.* at 57-58. Finally, the court asked, "Are you here then this morning to plead guilty because after thinking it over, and talking to your lawyer, and considering it very carefully, it seems to you to be the best course for you to follow at this stage?" Petitioner responded, "Yes, Your Honor." *Id.* at 58.

During the plea colloquy, petitioner admitted his participation in the two counts to which he was pleading guilty. He stated that he "should not have allowed those [false] hours to be billed out to the Corps of Engineers," and acknowledged that he could have rectified the situation that resulted in the Corps' overpayment of fees to EWA. Pet. App. 61; see *id.* at 59-62. Similarly, petitioner admitted that some of the hours billed to the Yakima Nation on the DOE contract were "billed wrongfully" or "were not authorized," that certain work was not within the scope of the contract, and that he "failed to rectify the situation." *Id.* at 63-64; see *id.* at 62-65. Under specific questioning by his own lawyer and by the court, petitioner acknowledged that he performed the admitted acts "voluntarily and intentionally" as part of his "agreement [with co-defendant Nguyen] to defraud the United States Government, that is, [to] get some moneys that EWA was not entitled to through that course of conduct," and stated explicitly that he "knew the company would benefit from those mischarges to our clients." *Id.* at 64-65.

At the end of the plea proceeding, the court again specifically asked petitioner whether he had understood each of the questions asked of him, whether he had answered those questions truthfully, and whether he wished to have more time to consult with his lawyer. Pet. App. 65. The court then accepted petitioner's guilty pleas, stating that it was "clear" to the court that those pleas were "free and voluntary and knowing."[2] *Id.* at 66.

Petitioner did not appeal his conviction or sentence. Petitioner did write a letter to the district court, approximately four months after sentencing, requesting a reduction in his sentence. That letter did not raise any allegation of impropriety with respect to petitioner's guilty plea. See Pet. Supp. C.A. App. 1-6. The court treated the letter as a motion under Fed. R. Crim. P. 35, and denied the motion (Pet. App. 74-75). The court of appeals affirmed (see *id.* at 4 n.1).

3. Immediately before his release from federal custody in June, 1992 (see Pet. App. 4 n.1), petitioner filed the motion under 28 U.S.C. 2255 that is at issue here. Pet. App. 76-85. The district court denied the motion. *Id.*

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[2] At petitioner's sentencing hearing, which took place several months after acceptance of his pleas, petitioner's counsel argued that petitioner's criminal conduct was narrower than the government's overall case suggested, but emphasized that petitioner was not "backpaddling" from his guilty pleas. Sent. Tr. 5, 7-8. He stated specifically that "the overriding point that I think Doctor Abi-Ghanem wants me to make on his behalf is he regrets the mistakes that he made, and does not deny that those mistakes constitute criminal conduct" (*id.* at 5), and that "through the process of negotiating with [the prosecutor], we came to realize that even though many of the allegations were defensible, some of them simply were not" (*id.* at 7). Immediately thereafter the court asked petitioner whether he had anything further to say on his own behalf, and petitioner responded "No, Your Honor, I don't have anything except I regret that this has happened." *Id.* at 8.

at 3-12. The court rejected petitioner's contention that his guilty plea was involuntary because he was not informed of the elements of the charges against him. *Id.* at 4-5, 8. The court held that it was "satisfied that petitioner's guilty plea was voluntary." *Id.* at 5.

The court also rejected petitioner's contention that his guilty pleas should be vacated because the government had failed to disclose to the district court that it had conditioned its plea agreements with petitioner and Nguyen on the willingness of both defendants to enter into acceptable agreements, so that the government would not be required to proceed to trial against either defendant. Pet. App. 6. The court concluded that the government's decision not to enter into separate agreements was not improper, that "[p]etitioner had a choice of whether to plead guilty or go to trial and he chose to plead guilty," and that "[p]etitioner's predicament was the result of his own criminal misconduct, not prosecutorial misconduct." *Ibid.* The court similarly rejected a variety of other claims raised by petitioner's motion. *Id.* at 7-12.

The court of appeals affirmed. Its brief order recited that the court had carefully considered petitioner's contentions that his pleas were coerced, involuntary, and not supported by a factual basis, and had found them to be without merit. Pet. App. 1-2. In a petition for rehearing and suggestion for rehearing en banc, petitioner argued that, in denying without opinion his claim regarding the failure to disclose the government's position with respect to separate pleas, the appellate panel had violated Eighth Circuit Rule 47B, which provides for summary affirmance in certain cases. See Pet. App. 126. The court denied the petition without further comment. *Id.* at 13.

ARGUMENT

1. Petitioner contends (Pet. 11-12, 15-25) that his guilty pleas should be vacated because of the parties' failure to notify the district court that the government had conditioned its agreement not to proceed to trial against each defendant on the willingness of both defendants to enter into satisfactory plea agreements. Petitioner claims that that failure violated Fed. R. Crim. P. 11 and the Due Process Clause, and prevented the district court from making an adequate assessment of the voluntariness of petitioner's plea.

a. As a threshold matter, petitioner waived any such claim by failing to raise it in a direct appeal from his conviction, at his sentencing hearing (more than four months after the acceptance of his pleas), or in his letter to the court seeking a reduction of his sentence under Fed. R. Crim. P. 35. As petitioner acknowledges (Pet. 24), it was not until petitioner filed the present motion under 28 U.S.C. 2255, more than one year after pleading guilty, that he first raised any claim of impropriety with respect to his pleas. See *United States* v. *Frady*, 456 U.S. 152, 162-166 (1982); *United States* v. *Timmreck*, 441 U.S. 780 (1979). The government apparently failed to raise the issue of waiver before either the district court or the court of appeals in this proceeding. Compare *Godinez* v. *Moran*, 113 S. Ct. 2680, 2685 n.8 (1993) (State may waive benefit of non-retroactivity rule of *Teague* v. *Lane*, 489 U.S. 288 (1989), in federal habeas corpus proceeding under 28 U.S.C. 2254). Petitioner's original default would nonetheless be a sufficient ground on which to affirm the judgment below in this case. See *Schiro* v. *Farley*, 114 S. Ct. 783, 788-789 (1994). The prospect of affirmance on that procedural ground,

regardless of the merits of petitioner's underlying claim, counsels against granting further review in this case.

b. In any event, petitioner's claim is without merit. The government may not induce a defendant to plead guilty "by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *Brady* v. *United States*, 397 U.S. 742, 750 (1970). In *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 n.8 (1978), this Court noted that "a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused * * * might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider." That concern applies to "package" plea agreements like the one at issue here on the ground that a defendant might be subject to pressure from his co-defendants to plead guilty so that they could obtain the benefits of the overall deal. See, *e.g.*, *United States* v. *Caro*, 997 F.2d 657, 658-659 (9th Cir. 1993).

Nonetheless, as petitioner acknowledges (Pet. 17-18), the courts of appeals have uniformly held that "package" pleas or other agreements conferring third-party benefits do not violate the Due Process Clause. See, *e.g.*, *United States* v. *Caro*, *supra*; *United States* v. *Clements*, 992 F.2d 417, 419 (2d Cir.), cert. denied, 114 S. Ct. 316 (1993); *United States* v. *Pollard*, 959 F.2d 1011, 1020-1021 (D.C. Cir.), cert. denied, 113 S. Ct. 322 (1992); *United States* v. *Morrow*, 914 F.2d 608, 613 (4th Cir. 1990); *Politte* v. *United States*, 852 F.2d 924, 930-931 (7th Cir. 1988); *Mosier* v. *Murphy*, 790 F.2d 62, 66 (10th Cir.), cert. denied, 479 U.S. 988 (1986). The government's offer of lenient treatment to a third person or of a "package" plea agreement is simply one factor bearing on the question whether a defendant's plea is voluntary. *Clements*, 992 F.2d at 419. As the Second Circuit put it in *United States*

v. *Marquez*, 909 F.2d 738, 742 (2d Cir. 1990), cert. denied, 498 U.S. 1084 (1991), "[s]ince a defendant's plea is not rendered involuntary because he enters it to save himself many years in prison, it is difficult to see why the law should not permit the defendant to negotiate a plea that confers a similar benefit on others."

The courts of appeals have adopted different procedural rules as to whether the parties are required to notify the district court at the Rule 11 hearing that a defendant's plea is part of a package deal. Compare, *e.g.*, *Caro*, 997 F.2d at 659-660 (government "must alert" district court to fact that defendants are entering linked agreements), and *United States* v. *Daniels*, 821 F.2d 76, 79-80 (1st Cir. 1987) (Rule 11(e)(2) requires disclosure of all material details of plea agreements, including linkage with other agreements), with *Ciements*, 992 F.2d at 419 ("preferred practice" is to advise court explicitly of any condition on plea agreement), and *Morrow*, 914 F.2d at 613 (failure to inform court of linkage of pleas "may raise eyebrows"). Those procedural differences do not, however, lead to substantially different outcomes, and they do not require this Court's intervention to fashion a uniform rule. No court has held that the failure to notify the district court that a plea agreement is one part of a package is a per se reason to allow a defendant to withdraw his guilty plea. The courts have focused, instead, on whether a particular plea was, in fact, voluntary. See, *e.g.*, *Caro*, 997 F.2d at 660; *Daniels*, 821 F.2d at 79-80; *Marquez*, 909 F.2d at 742; see also Fed. R. Crim. P. 11(h) (harmless error rule for acceptance of pleas); *United States* v. *Allard*, 926 F.2d 1237, 1244 (1st Cir. 1991).

In *Caro*, for example, the Ninth Circuit vacated the district court's order denying the defendant's motion to set aside his guilty plea before sentencing. While the court required the government to inform the district

court that the plea agreement involved a "package deal," the court also held that any failure to do so is subject to harmless error analysis under Fed. R. Crim. P. 11(h). The court made clear that on any particular set of facts, "[w]hether the plea is voluntary and intelligent is the touchstone for determining whether substantial rights have been violated in the acceptance of a guilty plea." 997 F.2d at 660. On the facts of the case before it, the court held that the government's failure to alert the district court to the "package" plea, and that court's consequent failure to inquire into the possibility of untoward pressure from the appellant's co-defendants, "could well have affected [the appellant's] decision" to plead guilty. *Ibid.* The court of appeals therefore remanded the case to the trial court for a "more careful examination" of the voluntariness of the plea. *Ibid.*, quoting *United States* v. *Castello*, 724 F.2d 813, 815 (9th Cir.), cert. denied, 467 U.S. 1254 (1984).

Similarly, in *Daniels*, the First Circuit reversed the defendant's conviction because, in addition to the parties' failure to advise the court of the "package deal" plea agreement, specific aspects of the Rule 11 colloquy between the district court and the defendant "cast doubt on the voluntariness of [the] plea." 821 F.2d at 79. The court indicated, however, that failure to disclose that a particular plea was part of a "package deal" would, like any other procedural error under Rule 11, be disregarded if it did not affect the voluntariness of the plea. *Id.* at 80.

In this case, there is no substantial factual question that petitioner's plea was voluntary. In response to thorough and careful questioning by the court, the prosecutor, and his own counsel, petitioner repeatedly acknowledged at the plea hearing that he understood both the charges against him and the rights that he was waiving, that he had consulted with his attorney, that he

understood and accepted the plea agreement, and that there was a proper factual basis for the charges to which he pleaded guilty. See pages 4-6, *supra*; Pet. App. 40-67. Petitioner agreed with the court that he had decided to plead guilty "because after thinking it over, and talking to [his] lawyer, and considering it very carefully, it seem[ed to him] to be the best course for [him] to follow." *Id.* at 58. Such declarations carry a strong presumption of verity when made in open court by any defendant. *Blackledge* v. *Allison*, 431 U.S. 63, 74 (1977); *Morrow*, 914 F.2d at 614; *Politte*, 852 F.2d at 931. In this case, they were made by a highly educated (see Pet. 2), commercially sophisticated defendant, represented by experienced counsel, after six months of preparation for trial. See Pet. App. 113-114.[3] In sum, the record provides no basis for concluding that petitioner's guilty pleas resulted from anything other than a knowing and voluntary choice. Under those circumstances, petitioner's claim would not have prevailed under any circuit's approach to "package" pleas.

2. Petitioner contends (Pet. 12-14, 25-30) that the court of appeals erred in disposing of this case by a summary order affirming the district court's decision (see Pet. App. 1-2). To the extent that petitioner's argument rests on a purported violation by the appellate panel of the court of appeals' own rules (see Pet. i, 26),

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[3] Although the petition and appendices contain various factual allegations about petitioner's relationship with his attorney, petitioner gave no hint of any dissatisfaction with his representation either at the plea hearing (where he specifically assured the judge to the contrary, Pet. App. 46) or four months later at his sentencing. Both courts below in this proceeding rejected petitioner's claim of ineffective assistance (*id.* at 1-2, 4-5; see Pet. C.A. Br. 27-28), and petitioner has not renewed that claim in this Court. See Pet. i.

the issue is properly left in the hands of the court of appeals, and does not call for this Court's review. Cf. *Wisniewski* v. *United States*, 353 U.S. 901 (1957); *Western Pac. R.R. Corp.* v. *Western Pac. R.R. Co.*, 345 U.S. 247, 260 & n.20 (1953).

To the extent that petitioner's argument rests on a broader proposition that the court below had a duty to issue a precedential opinion on the question whether the parties must specifically notify district courts of "package" plea arrangements, his claim lacks merit. Courts of appeals have substantial discretion in determining what issues require written opinions to give guidance to the lower courts within their jurisdictions, *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972), particularly with respect to matters of procedure. In light of the district court's treatment of the issues presented here (Pet. App. 4-6) and the essentially factual nature of the key question of voluntariness, there was no need for the court of appeals to write an opinion explaining its reasons for affirming the district court's disposition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

CYNTHIA A. YOUNG
Attorney

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